Office-Supreme Court, U.S.
FILED
MAY 13 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968

No. [redacted] 108

THE COLONNADE CATERING CORP.,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

PETITION (WITH APPENDICES) FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

O. JOHN ROGGE
1501 Broadway
New York, New York 10036

JEROME M. STEMBER
350 Fifth Avenue
New York, New York 10001

Attorneys for Petitioner

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL, STATUTORY AND OTHER PROVISIONS INVOLVED	3
Fourth Amendment	3
18 U.S.C. §3731	3
26 U.S.C. §5121(a)	4
26 U.S.C. §5146(b)	4
26 U.S.C. §7342	4
26 U.S.C. §7606(a)	5
Rule 41(e) of the Federal Rules of Criminal Procedure	5
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT	8
I. The forcible breaking and entering by agents of the Internal Revenue Service into the locked liquor storeroom of the petitioner (a caterer with a federal retail dealer's occupational tax stamp), and the warrantless search of this storeroom and seizure from it of a quantity of bottled liquor violated the Fourth Amendment	8
II. The United States Court of Appeals for the Second Circuit did not have jurisdiction to hear the appeal in this case under 18 U.S.C. §3731 as amended by section 1301 (a) of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 237	22
CONCLUSION	23

PAGE

APPENDICES:

APPENDIX I—Opinion of District Judge Walter R. Mansfield for the Second Circuit 1a

APPENDIX II—Memorandum and Order of June 28, 1968 of District Judge Jack B. Weinstein 18a

TABLE OF AUTHORITIES

Cases:

Alderman v. United States, 37 U.S.L. Week 4189 (March 10, 1969) 9

Berd v. Lovelace, Cary 62, 21 Eng. Rep. 33 (1576-1577) 20
Berger v. New York, 388 U.S. 41 (1967) 18
Boyd v. United States, 116 U.S. 616 (1886) 17

Camara v. Municipal Court, 387 U.S. 523 (1967) 10, 11

Davis v. Mississippi, 37 U.S.L. Week 4359 (April 22, 1969) 19
Dennis v. Codringham, Cary 100, 21 Eng. Rep. 53 (1579-1580) 20

Entinck v. Carrington, 2 Wils, K. B. 275, 291, 95 Eng. Rep. 807, 817, 818 (1765) 15, 17

Frank v. Maryland, 359 U.S. 360 (1959) 10, 11, 20

Gardner v. Broderick, 392 U.S. 273 (1968) 20
Garrity v. New Jersey, 385 U.S. 493 (1967) 21
Griswold v. Connecticut, 381 U.S. 479 (1965) 19
Groban, In re, 352 U.S. 330 (1957) 16

Jackson, Ex parte, 96 U.S. 727 (1877) 19
Jones v. United States, 362 U.S. 257 (1960) 19

PAGE

Katz v. United States, 389 U.S. 347 (1967) 8, 9, 18, 19
Kelway v. Kelway, Cary, 89, 21 Eng. Rep. 47 (1579-1580) 20

Lady Ivy's Trial, 10 How. St. Tr. 555 (1684) 20

Mancusi v. DeForte, 392 U.S. 364 (1968) 9
Mapp v. Ohio, 367 U.S. 643 (1961) 18

Olmstead v. United States, 277 U.S. 438 (1928) 18, 19

Paxton's Case 16
People ex rel. Attorney General v. Lansing Municipal Judge, 327 Mich. 410, 42 N.W. 2d 120 (1950) 21

Rios v. United States, 364 U.S. 253 (1960) 19
See v. City of Seattle, 387 U.S. 541 (1967).....10, 11, 12, 19, 21, 23

Semayne's Case, 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194, 195 (1603) 13
Shapiro v. United States, 335 U.S. 1 (1948) 22
Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920) 19
Spevack v. Klein, 385 U.S. 511 (1967) 21, 22
Stanley v. Georgia, 37 U.S.L. Week 4315 (April 7, 1969) 19
Stoner v. California, 376 U.S. 483 (1964) 19

Uniformed Sanitation Men v. Comm'r of Sanitation, 392 U.S. 28 (1968) 21
United States v. Frisch, 140 F.2d 600 (5th Cir. 1944) 11
United States v. Stanack Sales Co., 387 F.2d 849 (3d Cir. 1968) 21

Wattenberg v. United States, 388 F.2d 853 (9th Cir. 1968) 19
Wolf v. Colorado, 338 U.S. 25, 27 (1949) 18

Zap v. United States, 328 U.S. 624 (1946) 21

PAGE

United States Constitution:

Fourth Amendment 3, 8, 10, 17, 19, 21
Fifth Amendment 22

Statutes:

18 U.S.C. §3731 ..... 3, 7, 22
26 U.S.C. §5121(a) 4
26 U.S.C. §5146(b) 4, 8, 20
26 U.S.C. §7342 ..... 4, 20
26 U.S.C. §7606(a) 5, 8, 20
28 U.S.C. §1254(1) 2

Other Authorities:

1 Brougham, *Historical Sketches of Statesmen Who Flourished in the Time of George III* 42 (1858) 13-14
3 Coke, *Institutes* *162 13
4 Coke, *Institutes* *176-*77 14
2 Hale, *The History of the Pleas of the Crown* 113 14
3 May, *Constitutional History of England* 6, 7 (7th ed. 1882) 15
8 *Old South Leaflets* 57 (No. 179) 17
Rogge, *Inquisitions by Officials: A Study of Due Process Requirements in Administrative Investigations*—I, 47 Minn. L. Rev. 939 (1963); II, 48 Minn. L. Rev. 557 (1964); III, 48 Minn. L. Rev. 1081 (1964) 13
Tudor, *Life of James Otis*, 63 (1823) 16
Wilkes, *North Britain*, No. 45 14
2 *The Works of John Adams* App. 523, 524 (Chas. Francis Adams ed. 1850) 16

IN THE

Supreme Court of the United States

October Term, 1968

No. .....

THE COLONNADE CATERING CORP.,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, The Colonnade Catering Corp., prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the office of the clerk of that court on March 26, 1969.

Opinions Below

The United States Court of Appeals for the Second Circuit rendered an opinion written by District Judge Walter R. Mansfield, of the Southern District of New York, sitting by designation. It is reproduced as Appendix I, *infra*, pp. 1a-17a. This opinion is not yet reported.

The United States Court of Appeals for the Second Circuit reversed a memorandum and order of June 28, 1968 of District Judge Jack B. Weinstein of and for the United States District Court for the Eastern District of New York, granting the petitioner's request for the return of a quantity of its bottled liquor seized by agents of the Internal Revenue Service. Judge Weinstein's memorandum and order are reproduced as Appendix II, *infra*, pp. 18a-23a. His memorandum was not reported.

Jurisdiction

The United States Court of Appeals for the Second Circuit entered its judgment on March 26, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Did the forcible breaking and entering by agents of the Internal Revenue Service into the locked liquor storeroom of the petitioner (a caterer with a federal retail liquor dealer's occupational tax stamp), and the warrantless search of this storeroom and seizure from it of

a quantity of bottled liquor violate the Fourth Amendment?

2. Did the United States Court of Appeals for the Second Circuit have jurisdiction to hear the appeal in this case under 18 U.S.C. §3731, as amended by section 1301(a) of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 237?

Constitutional, Statutory and Other Provisions Involved

Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

18 U.S.C. §3731

Appeal by United States

An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

* * *

From an order, granting a motion for return of seized property or a motion to suppress evidence, made before the trial of a person charged with a violation of any law of the United States, if the United States attorney certi-

fies to the judge who granted such motion that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of the charge pending against the defendant.

26 U.S.C. §5121(a)

Imposition and rate of tax

(a) Retail dealers in liquors. Every retail dealer in liquors shall pay a special tax of $54 a year. * * *

26 U.S.C. §5146(b)

Preservation and inspection of records, and entry of premises for inspection

* * *

(b) Entry of premises for inspection.—The Secretary or his delegate may enter during business hours the premises (including places of storage) of any dealer for the purpose of inspecting or examining any records or other documents required to be kept by such dealer under this chapter or regulations issued pursuant thereto and any distilled spirits, wines, or beer kept or stored by such dealer on such premises.

26 U.S.C. §7342

Penalty for refusal to permit entry or examination

Any owner of any building or place, or person having the agency or superintendence of the same, who refuses to admit any officer or employee of the Treasury Department acting under the authority of section 7606 (relating to entry of premises for examination of taxable articles)

or refuses to permit him to examine such article or articles, shall, for every such refusal, forfeit $500.

26 U.S.C. §7606(a)

Entry of premises for examination of taxable objects

(a) **Entry during day.**—The Secretary or his delegate may enter, in the daytime, any building or place where any articles or objects subject to tax are made, produced, or kept, so far as it may be necessary for the purpose of examining said articles or objects.

Rule 41(e) of the Federal Rules of Criminal Procedure

Search and Seizure

* * *

(e) **Motion for return of Property and to Suppress Evidence.** A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant. * * *

Statement of the Case

The petitioner initiated this proceeding under Rule 41(e) of the Federal Rules of Criminal Procedure in the United States District Court for the Eastern District of New York, District Judge Weinstein presiding, for the re-

turn to it of some bottled liquor which agents of the Internal Revenue Service illegally seized from its locked liquor storeroom after a warrantless and forcible entry without its consent, as well as over its objections. District Judge Weinstein in a memorandum and order of June 28, 1968 granted the petitioner's motion for the return of its illegally seized property. In two paragraphs of his memorandum he stated the facts:

> The facts are undisputed. The petitioner, Colonnade Catering Corp., conducts a catering business and has a New York State liquor license. While a party was in progress, three Internal Revenue Service special investigators accompanied by a Nassau County policeman arrived at petitioner's premises at approximately 4:00 P.M. on May 18, 1968. (One of the Internal Revenue investigators, while a guest at petitioner's premises the previous week, had noted possible violations of the excise tax law.) They had no search warrant.
>
> After looking around the ballroom (a search which led to no seizures and the legality of which is not in issue here), the investigators demanded that the petitioner's locked liquor storeroom—located approximately seventy-five feet from the entrance to the ballroom—be opened for their inspection. Petitioner's president, the only person authorized to unlock the storeroom, refused. The investigators, who had been joined by the Internal Revenue Service area supervisor, forcibly broke into the storeroom and removed fifty-three bottles of liquor. No arrest was made then or since (App. II, pp. 18a-19a).*

These facts come from the petitioner's affidavits, and a statement to District Judge Weinstein during the course of

---

* The appendices to the petition for certiorari will be referred to as App. I or App. II, as the case may be. The government's appendix in the Second Circuit will be referred to as A.

argument before him (A. 28). The government's conclusory affidavit, by an assistant United States attorney without any personal knowledge of the facts, contains nothing, as this paragraph from it demonstrates:

> The facts of this case and the law governing these facts are fully set forth in the Government's Memorandum of Law which is submitted herewith. Upon information and belief and after conversations with the Special Investigators involved in this case, it is submitted that the inspection, examination and seizure here complained of were authorized by statute and were lawful in all respects (A. 14).

After Judge Weinstein's memorandum and order of June 28, 1968, the government took the case to the Second Circuit. Both parties as well as the Second Circuit treated this appeal as if it were under 18 U.S.C. §3731, as amended by section 1301(a) of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 237. The government stated in its brief in the Second Circuit:

> This is an appeal by the United States under the provision of 18 U.S.C. §3731[1], ([1]As amended by the Omnibus Crime Control and Safe Streets Act of 1968 (P.L. 90-351), Title VIII, Section 1301 (62 Stat. 844).) * * * (at p. 3)

The petitioner in its brief agreed (at p. 4). District Judge Mansfield began his opinion for the Second Circuit this way:

> This appeal is taken by the government pursuant to 18 U.S.C. §3731 * * * (App. I, p. 2a).

It is the petitioner's position here that no appeal lay under 18 U.S.C. §3731, even as amended.

The Second Circuit reversed District Judge Weinstein on the ground that 26 U.S.C. §§5146(b) and 7606(a) providing for administrative inspections by representatives of the Treasury Department resulted in an advance waiver of petitioner's rights under the Fourth Amendment. The petitioner takes the position that these statutory provisions are not susceptible of such a construction; and that if they are, then they themselves would violate the Fourth Amendment.

Reasons for Granting the Writ

I. The forcible breaking and entering by agents of the Internal Revenue Service into the locked liquor storeroom of the petitioner (a caterer with a federal retail dealer's occupational tax stamp), and the warrantless search of this storeroom and seizure from it of a quantity of bottled liquor violated the Fourth Amendment.

In accordance with the spirit of our law, embodied in constitutions and bills of rights, we guarantee to the individual a certain area, physical as well as mental, that is free from intrusion by the government. The Fourth Amendment is part of this guarantee.

As the Court stated through Mr. Justice Stewart in *Katz* v. *United States,* 389 U.S. 347 (1967), where the Court held a public telephone booth to be within the protection of the Fourth Amendment:

> * * * searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions. 389 U.S. at 357.

Or as the Court put it through Mr. Justice Harlan in *Mancusi* v. *DeForte*, 392 U.S. 364 (1968), where the Court gave standing to an indicted union official to object at his state trial to documents seized from the union office that he shared with others:

> * * * it is settled for purposes of the Amendment that "except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." 392 U.S. at 370.

Or yet again as Mr. Justice Fortas put it in Part II (in which Mr. Justice Douglas joined) of his opinion, concurring in part and dissenting in part, in *Alderman* v. *United States*, 37 U.S.L. Week 4189 (March 10, 1969):

> * * * The Fourth Amendment, unlike the Fifth, is couched in terms of a guarantee that the Government will not engage in unreasonable searches and seizures. It is a general prohibition, a fundamental part of the constitutional compact, the observance of which is essential to the welfare of all persons. 37 U.S.L. Week at 4197.

The reason for the requirement of a warrant is to interpose the detached scrutiny and the consequent deliberate, impartial judgment of a judicial officer between the individual and government agents. As the Court put it in *Katz* v. *United States*, 389 U.S. 347 (1967), referring to the governmental agents in that case:

> * * * They were not required, before commencing the search, to present their estimate of probable cause for detached scrutiny by a neutral magistrate. They were not compelled, during the conduct of the search itself,

to observe precise limits established in advance by a specific court order. * * *

* * *

* * * And bypassing a neutral predetermination of the *scope* of a search leaves individuals secure from Fourth Amendment violations "only in the discretion of the police." *Id.* at 97.

These considerations do not vanish when the search in question is transferred from the setting of a home, an office, or a hotel room to that of a telephone booth. Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures. * * * 389 U.S. at 356, 358-59.

Thus in the companion cases of *Camara* v. *Municipal Court,* 387 U.S. 523 (1967), and *See* v. *City of Seattle,* 387 U.S. 541 (1967), where the Court noted probable cause "to re-examine whether administrative inspection programs, as presently authorized and conducted, violate Fourth Amendment rights" (387 U.S. at 525), the Court held that they did; and overruled *Frank* v. *Maryland,* 359 U.S. 360 (1959) "to the extent that it sanctioned such warrantless inspections" (387 U.S. at 528). In *Camara,* which involved a residence, the Court through Mr. Justice White reasoned:

* * * The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasion by governmental officials. * * *

* * *

* * * except in certain carefully defined classes of cases, a search of private property without proper consent is "unreasonable" unless it has been authorized by a valid search warrant. * * *

* * *

In summary, we hold that adm
of the kind at issue here are signifi
the interests protected by the Fou
such searches when authorized an
a warrant procedure lack the tr
which the Fourth Amendment gu
vidual, and that the reason put fo
land and in other cases for upholdi
searches are insufficient to justi
weakening of the Fourth Amen
* * * 387 U.S. at 528, 528-29, 534

istrative searches
nt intrusions upon
Amendment, that
conducted without
tional safeguards
ntees to the indi-
in *Frank* v. *Mary-*
these warrantless
so substantial a
ent's protections.

In *See*, which involved commercial
added:

mises, the Court

> We therefore conclude that
> without consent, upon the portion
> ises which are not open to the
> compelled through prosecution or
> the framework of a warrant pro
> at 545.

inistrative entry,
commercial prem-
blic may only be
ysical force within
re. * * * 387 U.S.

Even in *Frank* v. *Maryland*, 359 U
the Court overruled in *Camara* to th
tioned warrantless inspections, the C
the administrative official there invol
forcible entry:

360 (1959), which
tent that it sanc-
t pointed out that
could not make a

> * * * Moreover, the inspector h
> entry and did not attempt it.
> resistance, but officials are not au
> the unwilling occupant. 359 U.S.

no power to force
ne is imposed for
ized to break past
366-67.

In addition, a Fifth Circuit case
to the Second Circuit's decision in th
States v. *Frisch*, 140 F.2d 600 (5th C

be cited as *contra*
tant case. *United*
1944).

It is also relevant to note that the reach of the Fourth Amendment extends not only to administrative inspections, but also to administrative subpoenas: once again judicial review is interposed between the individual and the administrative agency. As the Court stated through Mr. Justice White in *See* v. *City of Seattle*, 387 U.S. 541, 544-45:

> It is now settled that, when an administrative agency subpoenas corporate books or records, the Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome. The agency has the right to conduct all reasonable inspections of such documents which are contemplated by statute, but it must delimit the confines of a search by designating the needed documents in a formal subpoena. In addition, while the demand to inspect may be issued by the agency, in the form of an administrative subpoena, it may not be made and enforced by the inspector in the field, and the subpoenaed party may obtain judicial review of the reasonableness of the demand prior to suffering penalties for refusing to comply.
>
> It is these rather minimal limitations on administrative action which we think are constitutionally required in the case of investigative entry upon commercial establishments. The agency's particular demand for access will of course be measured, in terms of probable cause to issue a warrant, against a flexible standard of reasonableness that takes into account the public need for effective enforcement of the particular regulation involved. But the decision to enter and inspect will not be the product of the unreviewed discretion of the enforcement officer in the field. Given the analogous investigative functions performed by the administrative subpoena and the demand for entry, we find untenable the proposition that the subpoena, which has been termed a "constructive" search,

Oklahoma Press Pub. Co. v. *Walling*, 327 U.S. 186, 202, is the subject to Fourth Amendment limitations which do not apply to actual searches and inspections of commercial premises.

For a collection of many cases, state as well as federal, see Rogge, *Inquisition by Officials: A Study of Due Process Requirements in Administrative Investigations*—I, 47 Minn. L. Rev. 939 (1963); II, 48 Minn. L. Rev. 557 (1964); III, 48 Minn. L. Rev. 1081 (1964).

We submit that *Camara* and *See* are dispositive of the case at bar.

For the past 300 years and more, powerful voices among us have pointed out the importance of guaranteeing to the individual a certain area that is free from intrusion by the state. As early as 1603 in *Semayne's Case*, 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194, 195 (1603), the court stated: "That the house of every one is to him as his castle and fortress, as well for his defence against injury and violence as for his repose * * *"

Coke in his *Institutes* wrote that a man's house was his castle. 3 INST. *162.

The elder Pitt, Lord Chatham, declared movingly in the reign of George III: "The poorest man may in his cottage bid defiance to all the forces of the crown. It may be frail—its roof may shake—the wind may blow through it—the storm may enter—the rain may enter—but the King of England cannot enter!—all his force dares not cross the threshold of the ruined tenement!" 1 Brougham,

Historical Sketches of Statesmen Who Flourished in the Time of George III 42 (1858).

The practice of issuing search warrants arose in England in the middle of the 1600s. Before that time Coke in his *Institutes* stated that in the absence of an indictment justices of the peace had no power to issue a warrant "to search for a felon, or for stolen goods, for they being created by an act of parliament have no such authority granted unto them by any act of parliament." 4 *Inst.* *176-*77. But after the middle of the century Matthew Hale expressed a contrary opinion:

> In case of a complaint and oath of goods stolen, and that he suspects the goods are in such a house, and shews the cause of his suspicion, the justice of peace may grant a warrant, and to attach the goods and the party in whose custody they are found, and bring them before him or some justice of peace to give an account how he came by them, and farther to abide such order as to law shall appertain. * * *"

2 Hale, *The History of the Pleas of the Crown* 113 (published by Emlyn from the original manuscripts, Wilson ed. 1778)

Search warrants were used originally to recover stolen property. With the passage of the Licensing Act of 1662 for publications, the crown took to the use of these warrants in a general form to search for writings alleged to be seditious and for their authors, printers, and publishers. It was such a warrant which was used against John Wilkes and No. 45 of his paper the *North Britain*. This number came out in April 1763 and contained a biting

criticism of George III's message to Parliament. The king's ministers regarded it as a seditious libel and Lord Halifax, one of the secretaries of state, issued a general warrant. This warrant was ruled to be illegal, and the various resulting actions against the king's messengers were estimated to have cost the government as much as 100,000 pounds. 3 May, *Constitutional History of England* 6, 7 (7th ed. 1882). Wilkes recovered 4000 pounds from Lord Halifax himself.

Not long thereafter Lord Halifax furnished the court with another opportunity to consider general warrants. This time the offending publication was *The Monitor*, or *British Freeholder*. The warrant differed from that used against Wilkes in that it named the person, John Entinck, whose effects were to be seized, but it put no restrictions upon the officers as to the scope of the search. Entinck sued those who conducted the raid. The jury found a special verdict, stating the facts of the raid but setting up that such warrants had been in common use. Lord Camden, with the unanimous concurrence of the other judges of the court, ruled that general search warrants were illegal. To permit them, he reasoned, "would destroy all the comforts of society." *Entinck* v. *Carrington*, 2 Wils, K. B. 275, 291, 95 Eng. Rep. 807, 817, 818 (1765). According to the report of the case in 19 How. St. Tr. 1029, Lord Camden stated that to sanction the practice of issuing general search warrants "would be subversive of all the comforts of society." At 1066.

Just as in the mother country so in the colonies there was objection to general searches. However, in the colonies

the resistance was to searches for goods on which duties had not been paid rather than for publications. Parliament at the same session in 1662 in which it enacted a licensing act for publications, passed equally drastic measures for the enforcement of the revenue laws. The chief weapon of enforcement was the writ of assistance. This was a blanket permit issuable to anyone, authorizing him to search any suspected place. The only limitation was that the search had to be in the daytime. Proceedings under this statute appear to have aroused little opposition in England; but in the colonies, where taxation was none too popular irrespective of the methods of collection, the story was otherwise. In the course of time determined opposition arose. In 1761 in Massachusetts the legality of writs of assistance was questioned in *Paxton's Case.* The advocate general for the crown was James Otis and as such it became his duty to argue for their validity. Instead he resigned his office and took the other side of the case. In a masterful address he denounced writs of assistance as "the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law that ever was found in an English law book." 2 *The Works of John Adams* App. 523 (Chas. Francis Adams ed. 1850); Tudor, *Life of James Otis* 63 (1823). He further declared that they would place "the liberty of every man in the hands of every petty officer." 2 *The Works of John Adams* App. 524 (Chas. Francis Adams ed. 1850); Tudor, *Life of James Otis* 66 (1823). Mr. Justice Black quoted this poignant comment in his dissenting opinion in *In re Groban,* 352 U.S. 330, 338 (1957).

The judges in *Paxton's Case* almost convinced by Otis's argument sent to England for advice; but subsequently in obedience to order from the ministry, recognized the writs.

Although the case was lost, the cause was not. John Adams, who heard Otis's argument, later wrote:

> Every man of a crowded audience appeared to me to go away as I did, ready to take up arms against writs of assistance. Then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child independence was born.

Letter to William Tudor, March 29, 1817, printed in 8 *Old South Leaflets* 57, 60 (no. 179, p. 4).

Justice Bradley subsequently stated in his opinion for the Court in *Boyd* v. *United States*, 116 U.S. 616, 626 (1886), that Lord Camden's "great judgment in that occasion [*Entinck* v. *Carrington*, 2 Wils, K. B. 275, 291, 95 Eng. Rep. 807, 817, 818, 19 How. St. Tr. 1029 (1765)] is considered as one of the landmarks of English liberty."

In *Boyd*, the Court held that a provision of an act of Congress which required, in the words of the Court, "a compulsory production of a man's private papers in a proceeding to forfeit his property for alleged fraud against the revenue laws" violated the Fourth Amendment's prohibition of unreasonable searches and seizures. Justice Bradley explained:

> * * * And any compulsory discovery by extorting the party's oath or compelling the production of his private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom. 116 U.S. at 631-32.

In the same vein Justice Brandeis wrote in his dissenting opinion in *Olmstead* v. *United States*, 277 U.S. 438 (1928):

> • • • The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. • • • 277 U.S. at 478.

The *Olmstead* case was questioned in *Berger* v. *New York*, 388 U.S. 41 (1967) and overruled in *Katz* v. *United States*, 389 U.S. 347 (1967). Justice Douglas in his concurring opinion in *Berger* stated that *Berger* overruled *Olmstead sub silentio*. 388 U.S. at 64.

In the same vein the Court wrote in *Wolf* v. *Colorado*, 388 U.S. 25, 27 (1949):

> The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society.

The actual holding in *Wolf*, that material illegally seized by state officers was admissible in a state court proceeding, was overruled in *Mapp* v. *Ohio*, 367 U.S. 643 (1961).

Today the reach of the Fourth Amendment, of the right to be let alone by the government (to paraphrase the language of Justice Brandeis in his dissenting opinion in *Olmstead*), extends far beyond one's home. It extends to a sealed letter entrusted to the mail. ***Ex parte Jackson,*** 96 U.S. 727 (1877). It extends to an individual in a business office. ***Silverthorne Lumber Co.*** v. ***United States,*** 251 U.S. 385 (1920). It extends to one in a friend's apartment. *Jones* v. ***United States,*** 362 U.S. 257 (1960). It extends to one in a taxicab. ***Rios*** v. ***United States,*** 364 U.S. 253 (1960). It extends to a guest in a hotel room. ***Stoner*** v. ***California,*** 376 U.S. 483 (1964). It extends to a person in a public telephone booth. ***Katz*** v. ***United States,*** 389 U.S. 347 (1967). It extends to police detention for the purpose of taking fingerprints. ***Davis*** v. ***Mississippi,*** 37 U.S.L. Week 4359 (April 22, 1969). It extends to an open field adjacent to one's house which one seeks to preserve as private. *Wattenberg* v. ***United States,*** 388 F.2d 853 (9th Cir. 1968). And it extends to commercial premises which are not open to the public. *See* v. ***City of Seattle,*** 387 U.S. 541 (1967).

The approach of the Fourth Amendment, that of guaranteeing to the individual a certain area that is free from intrusion by the government, expresses itself in many other ways than a proscription of unreasonable searches and seizures. It expresses itself, for instance, in giving a right to an individual to have pornography in his own home. *Stanley* v. *Georgia,* 37 U.S.L. Week 4315 (April 7, 1969). It expresses itself, for instance, in protecting a husband and wife in the practice of contraception. *Griswold* v. *Connecticut,* 381 U.S. 479 (1965).

The approach behind the Fourth Amendment, that of guaranteeing to the individual a certain area that is free

from intrusion by the government, has helped to bring about the protection of confidential relationships such as those between attorney and client, and husband and wife. The protection of the confidential communications between attorney and client goes back to the reign of Elizabeth I. *Berd* v. *Lovelace,* Care 62, 21 Eng. Rep. 33 (1576-1577); *Kelway* v. *Kelway,* Cary 89, 21 Eng. Rep. 47 (1579-1580); *Dennis* v. *Codringham,* Cary 100, 21 Eng. Rep. 53 (1579-1580). Similar protection to the confidential communications between husband and wife may be traced back to a case as early as 1684. *Lady Ivy's Trial,* 10 How. St. Tr. 555, 628 (1684).

However, the government contended, and the Second Circuit agreed (App. I, pp. 12a-17a), that the inspection provisions of 26 U.S.C. §§5146(b) and 7606(a) resulted in a waiver of petitioner's Fourth Amendment rights. We submit on the contrary that these sections do not have any such result. It may also be observed that, as in *Frank* v. *Maryland,* 359 U.S. 360 (1959), 26 U.S.C. §7342 provides for a fine of $500 for a refusal to permit an examination under 26 U.S.C. §7606.

Furthermore, if sections 5146(b) and 7606(a) were to have any such result as the waiver of petitioner's Fourth Amendment rights, these sections would themselves be unconstitutional as violating that amendment.

Whether there may be a waiver of a federal constitutional right, to operate not contemporaneously but *in futuro,* is at least an open question. The Court adumbrated the question in *Gardner* v. *Broderick,* 392 U.S. 273, 278-79

(1968) and *Uniformed Sanitation Men* v. *Comm'r of Sanitation*, 392 U.S. 280, 284 n. 5 (1968), but did not reach it. See also *Spevack* v. *Klein*, 385 U.S. 511 (1967), and *Garrity* v. *New Jersey*, 385 U.S. 493 (1967).

The Supreme Court of Michigan did decide the question. It held in *People ex rel. Attorney General* v. *Lansing Municipal Judge*, 327 Mich. 410, 42 N.W. 2d 120 (1950), that a statutory provision permitting conservation officers to make certain wild life inspections without a warrant, was unconstitutional as permitting unreasonable searches and seizures. The Court reasoned:

> Under Michigan law a man may not marry a wife, operate a motor vehicle on the highways, practice law, or a number of other things, without a license from the State. May the legislature condition the granting of such licenses upon the applicant's waiver of his constitutional rights against unreasonable search of his home, marital chamber, automobile, law office or other place where a licensed activity occurs? • • •

327 Mich. at 431, 42 N.W. 2d at 125. *Cf. United States* v. *Stanack Sales Co.*, 387 F.2d 849 (3d Cir. 1968), where the Third Circuit applied *See* v. *City of Seattle*, 387 U.S. 541 (1967), to inspectors of the Food and Drug Administration; and refused to find a waiver of Fourth Amendment rights.

The government, and the Second Circuit (App. I, p. 13), relied on *Zap* v. *United States*, 328 U.S. 624 (1946). Whatever that case may say, there was involved no forcible entry. As the Court itself stated:

> • • • No force or threat of force was employed. Indeed, the inspection was made with the full cooperation of petitioner's staff. • • •

> * * * They [the governmental agents] did not obtain access by force, fraud, or trickery. * * * 328 U.S. at 628, 629.

The government, and the Second Circuit (App. I, p. 13), also relied on *Shapiro* v. *United States,* 335 U.S. 1 (1948). *Shapiro* is a Fifth Amendment case where the Court created a required records exception to the privilege against self-incrimination. To the extent that the language in that case, a five-to-four decision of more than two decades ago, may be thought to support a waiver *in futuro* of constitutional rights, the case is due for re-examination. Mr. Justice Fortas in his concurring opinion in *Spevack* v. *Klein,* 385 U.S. 511 (1967), stated that he "would be prepared in an appropriate case to re-examine the scope of the principle announced in *Shapiro* v. *United States,* 335 U.S. 1 (1948)". 385 U.S. at 520.

II. The United States Court of Appeals for the Second Circuit did not have jurisdiction to hear the appeal in this case under 18 U.S.C. §3731 as amended by section 1301(a) of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 237.

Both parties, and the court, assumed that an appeal lay in the instant case under 18 U.S.C. §3731, as amended by section 1301(a) of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 237. They were mistaken. To begin with, 18 U.S.C. §3731 deals with appeals by the government directly to the United States Supreme Court in certain instances in criminal cases. This is not a criminal case. There is pending no criminal charge.

In the second place, the petitioner is not charged with a violation of any law of the United States.

In the third place, the United States Attorney did not certify to District Judge Weinstein, who granted the petitioner's motion for the return of its bottled liquor, that the appeal was not taken for the purpose of delay, and that the evidence was a substantial proof of the charge pending against the petitioner. There was of course no charge.

Conclusion

Just as writs of assistance in colonial days, so warrantless inspections by agents of the Internal Revenue Service today, would (in the living words of James Otis in his argument against the legality of writs of assistance) place "the liberty of every man in the hands of every petty officer". The Court should grant certiorari, and hold *See* v. *City of Seattle*, 387 U.S. 541 (1967), applicable to warrantless forcible entries and the resultant illegal searches and seizures by federal officials.

Respectfully submitted,

O. John Rogge
1501 Broadway
New York, New York 10036

Jerome M. Stember
350 Fifth Avenue
New York, New York 10001

Attorneys for Petitioner

APPENDICES TO PETITION

APPENDIX I

Opinion of District Judge Walter R. Mansfield for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 310—September Term, 1968.

(Argued February 12, 1969 Decided March 26, 1969.)

Docket No. 32817

In the Matter of the Petition of

THE COLONNADE CATERING CORP.,

Plaintiff-Appellee,

—v.—

UNITED STATES OF AMERICA,

Defendant-Appellant.

Before:

ANDERSON and FEINBERG, *Circuit Judges,*
and MANSFIELD, *District Judge.**

Appeal from an order of the United States District Court for the Eastern District of New York, Weinstein, J., granting appellee, The Colonnade Catering Corp.'s petition for the suppression and return of certain of its property seized by agents of the Internal Revenue Service. Reversed and remanded.

---

* Of the Southern District of New York, sitting by designation.

JEROME M. STEMBER, New York, N. Y., *for Appellee.*

CHARLES RUFF, Attorney, Department of Justice, Washington, D. C. (Joseph P. Hoey, United States Attorney, David P. Steinmann, Assistant United States Attorney, Eastern District of New York, and Richard L. Mays, Attorney, Department of Justice, Washington, D. C., on the brief), *for Appellant.*

MANSFIELD, *District Judge:*

This appeal is taken by the Government pursuant to 18 U.S.C. §3731 from an order of the district court granting the petition of appellee Colonnade Catering Corporation ("Colonnade") for the suppression and return of 53 bottles containing alcoholic spirits and two funnels seized by agents of the Internal Revenue Service. We conclude that the search and seizure of the property was reasonable and accordingly reverse the decision below.

On the afternoon of Saturday, May 18, 1968, three Special Investigators of the Internal Revenue Service, accompanied by a Nassau County policeman, entered Colonnade's premises at approximately 4:00 P.M. Collonade, which holds a New York State liquor license, operates a catering establishment, and at the time there was a party in progress in its ballroom where liquor was being served. The purpose of their visit was to determine whether Colonnade possessed any liquor bottles that had been refilled or altered, which would constitute a violation of both fed-

eral tax laws, 26 U. S. C. §5301(c) and New York's Alcohol Beverage Control Law §107-a and Rule 4 of the State Liquor Authority.[1] One of the agents had attended a party there on the previous Saturday and had observed what he thought were resealed bottles of liquor.

After looking around the ballroom with the manager's consent, the agents inspected the basement of the building without result and stated that they wished to enter a locked liquor storeroom located about 75 feet from the entrance to the ballroom. They were informed that Colonnade's president was the only person with authority to unlock the door; he was called to the scene but refused to do so. Instead he asked the agents if they possessed a warrant and, upon being told by the area supervisor of the Alcohol Tax Unit (who had meanwhile arrived) that according to statute they did not need one, he refused to unlock the door, whereupon the agents broke the lock,

1. The federal statute provides in pertinent part that:

"*Refilling of liquor bottles.*—No person who sells, or offers for sale, distilled spirits, or agent or employee of such person shall—

"(1) place in any liquor bottle any distilled spirits whatsoever other than those contained in such bottle at the time of stamping under the provisions of this chapter; or

"(2) possess any liquor bottle in which any distilled spirits have been placed in violation of the provisions of paragraph (1); or

"(3) by the addition of any substance whatsoever to any liquor bottle, in any manner alter or increase any portion of the original contents contained in such bottle at the time of stamping under the provisions of this chapter; or

"(4) possess any liquor bottle, any portion of the contents of which has been altered or increased in violation of paragraph (3); * * *."

entered, and seized the liquor and funnels which are the subject of this petition.

Upon Colonnade's motion to suppress the evidence pursuant to Rule 41(e), F. R. Cr. P.,[2] the district court held that the warrantless search and seizure was in derogation of the right of Colonnade and its officers "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizure." U. S. Const. Amend. 4. In his opinion Judge Weinstein concluded that the Supreme Court's recent decisions in *Camara* v. *Municipal Court*, 387 U. S. 530 (1967) and *See* v. *City of Seattle*, 387 U. S. 541 (1967), extending Fourth Amendment protection to administrative searches of the type there under attack, including a search of a commercial warehouse, precluded a warrantless search of Colonnade's liquor storeroom. The Government contends that the warrantless search in this case is to be distinguished from those before the Supreme Court there, and that search without a warrant was permissible here because it was authorized by statute, 26 U. S. C. §§5146(b) and 7606(a),[3] and the essential gov-

2. Rule 41(e), F. R. Cr. P., provides in pertinent part that:

"A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant. * * * If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial."

3. These sections provide:

26 U. S. C. §5146(b)

"*Entry of premises for inspection.*—The Secretary or his delegate may enter during business hours the premises (including places of storage) of any dealer for the purpose of inspecting

ernmental purpose to be served would be frustrated if a warrant were required. See *Peeples* v. *United States*, 341 F. 2d 60 (5th Cir.), cert. denied, 380 U. S. 988 (1965); *United States* v. *Sessions*, 283 F. Supp. 746 (N. D. Ga. 1968) (following *Peeples* after the decisions in *Camara* and *See*); accord: *United States* v. *Duffy*, 282 F. Supp. 777 (S. D. N. Y. 1968) (dictum). Appellant further argues that in any event Colonnade, by engaging in the retail liquor business, impliedly consented to warrantless inspections of its business premises.

The first qnestion to be decided is whether the search here must be barred on the authority of *Camara* and *See*, which dealt with the legality of warrantless administrative searches conducted in aid of municipal code enforcement. In those decisions the Supreme Court concluded that where broad inspection authority is granted by statute to an administrative officer, the warrant procedure with its individualized review is required to assure that reasonable limits will be imposed upon the exercise of such authority in each instance and to protect the occupant against excessive intrusion upon his privacy, since he cannot be expected to know the lawful limits of the inspector's power. Furthermore, since the need to search in some cases might

---

or examining any records or other documents required to be kept by such dealer under this chapter or regulations issued pursuant thereto and any distilled spirits, wines, or beer kept by such dealer on such premises."

26 U. S. C. §7606(a)

"*Entry during day.*—The Secretary or his delegate may enter, in the daytime, any building or place where any articles or object subject to tax are made, produced, or kept, so far as it may be necessary for the purposes of examining said articles or objects."

be questionable, a particular search might be unreasonable. However, the Supreme Court limited its decision to "administrative searches of the kind at issue here," *Camara, supra* at 534 (i.e., those conducted pursuant to broad grants of authority). Justice White, speaking for the majority in both cases, further observed that warrantless searches are permitted in "certain carefully defined classes of cases," and stated that the question of whether to require a warrant must depend "in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search," *Camara, supra* at 533. With respect to a search of business premises, such as that involved here, the Court went further:

> "We do not in any way imply that business premises may not reasonably be inspected in many more situations than private homes, nor do we question such accepted regulatory techniques as licensing programs which require inspections prior to operating a business or marketing a product." *See, supra* at 545-546.

Thus the door was left open to warrantless administrative searches in those special situations where protection against excessive intrusions upon the individual's privacy could be reasonably assured and the objectives demanded by the public interest would be frustrated if the inspectors were required to obtain warrants. We believe that for several reasons the limited search of a liquor licensee's storeroom by Internal Revenue Service agents falls within the limited exception contemplated by the Supreme Court. In the first place, the statutory grants authorizing the administrative searches in *Camara* and *See*, unlike those

here, were extremely broad in scope. For instance, §503 of the San Francisco City Housing Code, which was the ordinance under consideration in *Camara,* gave city inspectors the power to enter "any building, structure, or premises in the City to perform any duty imposed upon them by the Municipal Code." This included the duty (among others) of determining through periodic inspection whether conditions existed in "residential buildings, dwelling units and neighborhoods" that might be found to be "dangerous, substandard, insanitary or obsolete and deficient," San Francisco Housing Code §101; Part III, §86, San Francisco Municipal Code. In *See,* which involved an attempted inspection of a locked commercial warehouse, the authority was only slightly more restricted. The relevant statute provided for entry by the Fire Chief into buildings other than dwellings "as often as may be necessary for the purpose of ascertaining and causing to be corrected any conditions liable to cause fire, or any violations of the provisions of this Title, and of any other ordinance concerning fire hazards," Seattle Fire Code §8.01.050, 387 U. S. at 541. These expansive grants of authority would permit an inspector, unless a warrant was required, to roam at will through any portion of a dwelling house, in one case, or of commercial property, in the other, without the occupant or owner being able to determine the need for the inspection, its purpose and its lawful limits. Theoretically the inspection might seek to uncover any one or more of innumerable possible violations, such as faulty wiring, plumbing, foundations, beams, or the like. Without the safeguard of the warrant machinery, the inspectors could conduct a "general search" of the very type pre-

scribed by the Fourth Amendment. As Justice White noted, "such broad statutory safeguards are no substitute for individualized review," 387 U. S. at 533.

In contrast to such broad delegation of inspection authority, the statutory grants of inspection power here under review are carefully defined and narrowed to the point where they grant little, if any, more authority than that which would be extended in a warrant issued by a magistrate after review. The sole authority granted is permission, during business hours, to enter the premises of a dealer in liquor who is subject to a special federal alcohol tax, 26 U. S. C. §5121(a),[4] for the limited purpose (not involved here) of inspecting those "records or other documents required to be kept by the dealer under this chapter" and the further limited purpose of inspecting "any distilled spirits, wines or beers kept by such dealer on such premises," 26 U. S. C. §5146(b), or to enter "any building or place where any articles or object subject to tax are made, produced, or kept, so far as it may be necessary for the purposes of examining said articles or objects," 26 U. S. C. §7606(a). The agent in the field is not, by virtue of these statutory provisions, given authority to conduct a general search of the premises; he is limited to the place where the liquor is kept and to inspection of specific objects, i.e., the alcoholic beverages. The scope of permissible intrusion without a warrant is thus carefully restricted and it does not entitle the agent to dispense with a warrant before searching the dwelling place of the owner

4. This section provides that:

"*Retail dealers in liquor.*—Every retail dealer in liquor shall pay a special tax of $54 a year. * * *"

of a retail liquor establishment, *United States* v. *Frisch*, 140 F. 2d 660 (5th Cir. 1944), or clothing belonging to such a person, cf. *Finn's Liquor Shop Inc.* v. *State Liquor Authority*, —— App. Div. 2d ——, 294 N. Y. S. 2d 592 (1st Dept. 1968).

The limited search permitted to be made by an alcohol tax inspector is also distinguishable in another significant respect from the searches reviewed in *Camara* and *See*. As was pointed out by Justice White, broad statutory authorizations of the type there under consideration pose the danger that in a confrontation with an administrative inspector claiming statutory authority to enter and inspect for possible housing or fire code violations, the homeowner or businessman may have "no way of knowing the lawful limits of the inspector's power to search, and no way of knowing whether the inspector himself is acting under proper authorization." 387 U. S. at 532. Such a risk, in the type of inspection involved here, is minimal. Dealers in liquor, unlike homeowners or businessmen conducting less specialized activities, are engaged in a heavily regulated business.[5] They are usually well aware of the regula-

5. All states which permit the retail sale of liquor by private persons license this activity. A 1960 survey showed that, including the District of Columbia, 33 states had such licensing programs for sales at retail for consumption off the premises, while 17 operated under the state monopoly system. H. Levin, *Economic and Regulatory Aspects of Liquor Licensing*, 112 U. Pa. L. Rev. 785, Table 1 at 786 (1964) [Derived from Joint Committee of the States to Study Alcoholic Beverage Laws, *Alcoholic Beverage Control* (rev. ed. 1960)]. No state permits the sale of alcoholic beverages for consumption on the premises without a license. The mass of state and federal legislation regulating this industry is collected and annotated in *CCH Liquor Control Law Rep.* (9 vols.).

The regulatory laws of many states, including those of New York, to which Colonnade is subject, provide for warrantless inspections

tions to which they are subject, and are undoubtedly familiar with the nature and limits of the inspector's authority. Cf. *Zap* v. *United States*, 328 U. S. 624 (1946). In fact it is their very knowledge of the possibility of such inspections that make the inspection program an effective means of enforcing the tax law. Such sophisticated licensees, when faced with an inspector whose authority to search is carefullly restricted and circumscribed by regulations known to all, are undoubtedly acquainted with the limits upon the agent's inspection rights.

For the foregoing reasons the imposition of a requirement that alcohol tax inspectors obtain warrants before carrying out the specifically defined inspection authorized by statute would serve no useful purpose in protecting the Fourth Amendment rights of the liquor dealer. Those rights are already protected by the restrictions contained in the statute itself. We are not dealing here with "area" or "general" searches of the type authorized by municipal codes, and there is no need to utilize the warrant machinery as a means of establishing standards for protection against unwarranted intrusions possible under such codes. Here the area eligible for inspection is clearly and narrowly defined; the purpose is relevant; the scope is limited; and all of these aspects are well known to the operator of the

---

of the type authorized by the federal statutes here. E.g., 3 McKinney's Consol. Laws of New York Ann. §106(15); 35 Alaska Compiled Laws Ann. §35-4-15(6); Ark. Statutes, Ch. 48, §48-203(d); 30 Conn. Gen. Statutes Ann. §30-6; Fla. Statutes, Ch. 562, §562.031; 43 Ill. Ann. Statutes §112.2; Kansas Statutes Ann. Ch. 41, §41-209 (5); 26 La. Rev. Statutes §378; 2B Ann. Code of Md. §190; Ann. Laws of Mass. Ch. 138, §24; Rev. Statutes of Neb. Ch. 53, §53-117; 33 N. J. Statutes Ann. §33:1-23; 37 Okl. Statutes §514(9); 47 Penn. Statutes Ann. §2-209; 7 Vt. Statutes Ann. §564.

premises being inspected. Nothing of consequence therefore would be achieved through individualized review by a magistrate. In the proper exercise of his discretion, the magistrate would be compelled to issue a warrant as a matter of course, duplicating the limited authority already granted by statute. In short, the statute here under consideration is the equivalent of a warrant.

There remains the question of whether the public interest in alcohol tax inspections would be hindered or prejudiced in any way by warrant procedure, even if all that it involved were the automatic issuance of "rubber stamp" warrants. The public interest in such periodic inspections is hardly open to question. It derives from the potentially great loss to the national revenue which would result from ineffective enforcement of the alcohol tax law. In the fiscal year 1966, for instance, over $3 billion was collected in excise taxes on distilled spirits. The Annual Report of the Commissioner of Internal Revenue (1967), p. 117. A common method of evading such taxes by retailers who sell liquor by the drink is the illegal refilling of bottles in violation of 26 U. S. C. §5301(c). The goal of the inspection is to deter such violations. An important factor in achieving that goal is the element of surprise. As experience and efforts to enforce the Eighteenth Amendment so frequently revealed in the 1920's, the liquor dealer-violator who receives an advance tipoff of an imminent inspection destroys the evidence before the agent arrives on the scene. Although the dealer knows that he may be visited by inspectors, the effective implementation of the law depends upon his being kept in the dark as to the precise time of the

visit. If, as the Supreme Court indicated in *Camara*, "warrants should normally be sought only after entry is refused," 387 U. S. at 539, the cat would be let out of the bag in most instances where a violation was being committed and the essential governmental purpose would be frustrated. Warned of the inspection the dealer would quickly destroy or otherwise dispose of the contents of the illegally filled bottles before the inspector returned with his warrant. In this respect the result would differ radically from that presented in municipal code enforcement of the type at issue in *Camara* and *See*, where a delay attendant upon obtaining a warrant might be helpful in achievement of the public interest goals, since the violator might be induced to eliminate the hazard before the inspector's return. Here the effect will be to enable the dealer to escape payment of taxes constituting an essential part of the revenue; and it may be expected that if such a dealer could escape detection, he would repeat the violations with impunity.

We further conclude that an inspection of the type here under review may be lawfully conducted without a warrant for the reason that the retail liquor dealer, upon obtaining his state license and his federal occupational stamp, enters this highly regulated business with a full awareness and expectation that his liquor supply, including that located in "places of storage," 26 U. S. C. §5146(b), will be inspected by representatives of the Treasury Department. Whether his conduct in entering the business upon such a condition be labelled an implied consent to such an inspection, cf. *Zap* v. *United States*, 328 U. S. 624 (1946), or a limited dedication to public inspection of that portion of his premises in which his liquor supply is stored,

it is clear that he anticipates that such an inspection will be made and he is well aware of the need for such inspection. The situation is substantially the same as if the dealer had knowingly entered into a contract waiving his right to privacy in those areas where he keeps and sells alcoholic beverages. Such a waiver with respect to subject matter in which the public has a special interest would be enforceable, *Zap* v. *United States,* 328 U. S. 624 (1946); see *Shapiro* v. *United States,* 335 U. S. 1 (1948), and is to be distinguished from unrelated waivers, cf. *Garrity* v. *New Jersey,* 385 U. S. 493 (1966); *Spevack* v. *Klein,* 385 U. S. 511 (1967), which have been nullified on the ground that such conditions would constitute an unreasonable forfeiture of the citizen's constitutional rights. It does not strike us as unreasonable to require that a liquor dealer, as a condition to entry into a business in which the Government has such a direct and special interest, submits himself to statutory authority to the extent of permitting warrantless inspection of alcoholic beverages on his business premises. In the face of such extensive regulatory measures, the dealer can hardly contend with any degree of conviction that he has a "reasonable expectation of freedom from governmental intrusion" into his bar and liquor storage space, *Mancusi* v. *DeForte,* 392 U. S. 364 (1968); *Katz* v. *United States,* 389 U. S. 347 (1967). In this respect his status differs sharply from that of the homeowner in *Camara* or the operator of a commercial warehouse in *See,* neither of whom could have been expected to have familiarity with the city inspectors' inspection powers under the broad municipal codes there involved. In contrast, the

liquor dealer is well aware of the limits of the alcohol tax inspector's authority. To require him to execute an express advance agreement authorizing periodic inspections without warrant would be a superfluous gesture in view of their general awareness of the likelihood of periodic surprise inspections. His situation is comparable to that of the traveler who anticipates a border search of his baggage upon entry into the United States, 19 U. S. C. §§1467, 1496, 1582, a coal mine operator who expects to be inspected by the Secretary of Interior, 30 U. S. C. §§451-454, or an air carrier which is aware of the prospect that its lands, buildings and equipment will be inspected by the C. A. B., 49 U. S. C. §1377. The constitutionality of statutes authorizing such limited warrantless searches in the public interest is generally recognized, *Landau* v. *United States Attorney for the Southern District of New York*, 82 F. 2d 285 (2d Cir. 1936), and the additional imposition of warrant procedure would not serve any useful purpose.[6]

6. Many other federal statutory provisions permit warrantless inspections. E.g., 42 U. S. C. §2051 (inspection of places where research in atomic energy is performed by A. E. C.); 46 U. S. C. §408 (inspection of vessel boiler plates at manufacturer's plant by Coast Guard); 21 U. S. C. §§603, *et seq.* (inspection of meat and meat products by Secretary of Agriculture); 42 U. S. C. §262 (inspection of establishments engaged in the preparation of certain kinds of drugs by the Public Health Service); 15 U. S. C. §1270 (inspection of any factory or warehouse in which "hazardous substances" are manufactured, processed, packed, or held for introduction into commerce and of any vehicle being used to transport or hold such substances by the Secretary of Health, Education and Welfare); 21 U. S. C. §157 (inspection of any establishment engaged in the production of certain types of drugs for the treatment of animals by the Secretary of Agriculture); 21 U. S. C. §374 (inspection of any establishment where food, drugs, devices or cosmetics are manufactured, processed, packed or held for introduction into commerce by the Secretary of Health, Education and Welfare).

Having concluded for the foregoing reasons that the search of Colonnade's liquor storeroom conducted by the representatives of the Internal Revenue Service pursuant to 26 U.S.C. §§5146(b) and 7606(a) was not rendered unreasonable by the fact that it was conducted without a warrant, we turn to Colonnade's contention that the decision below should be affirmed on the ground that the search was unreasonable.

Colonnade contends that two factors in this case compel affirmance. First, it is argued that the fact of the agents' forcible entry into the liquor storeroom rendered the search "per se" unlawful. However, a search reasonably conducted pursuant to a search warrant is not rendered unreasonable by the use of force in its execution, if the prerequisite of announcement of authority and purpose is fulfilled, 18 U. S. C. §3109; the same standard applies to arrests without a warrant, *Sabbath* v. *United States,* 391 U. S. 585 (1968), and we see no rational basis for applying a different standard of conduct to warrantless searches. In short, where it is reasonable to conduct a search without a warrant, it is accordingly reasonable to use whatever minimal force is necessary to carry out the search, provided, as is the case here, that the authority of the agent to make the search and the purpose of the entry is announced, and consent to entry is not forthcoming. There would be no point in holding warrantless searches by alcohol tax inspectors to be reasonable if the owner of the premises could render them unreasonable by withholding his consent and compelling the agent to use the minimum amount of force necessary to accomplish his objective.

Second, it is strenuously urged by Colonnade that the search here was unreasonable because the Internal Revenue Service had some basis for believing that evidence of a violation of 26 U. S. C. §5301(c) could be found on the premises. Thus, it argues, although a routine "administrative" search might be reasonable, the existence of some ground for the search renders it a search pursuant to a "criminal investigation" for which a warrant should be required.[7] In point of fact, of course, any inspection or search conducted by an agent for possible alcohol tax violations could be characterized as a search pursuant to a criminal investigation. Whether or not he has cause to believe that evidence of any such violations will be found, the purpose of the inspection will be to determine, by testing the contents of liquor bottles, whether the business is being conducted lawfully or unlawfully.

Acceptance of defendant's contentions would place the agent in the position of being authorized to conduct a warrantless search only when he had no reason to suspect a possible violation. If, as *Camara* suggests, the withholding of consent forms a basis for a reasonable belief that evidence of a violation can be found, see p. 1677 *supra*, a warrant would be required whenever consent was not given, and the public interest in reasonable warrantless searches would be frustrated. We conclude, therefore, that warrantless searches pursuant to the limited statutory authority of 26 U. S. C. §§5146(b) and 7606(a) for the purpose of investigating possible violations of 26 U. S. C. §5301(c) are

7. Violation of 26 U. S. C. §5301(c) is punishable by a fine of not more than $1,000, or imprisonment for not more than one year, or both. 26 U. S. C. §5606.

reasonable within the meaning of the Fourth Amendment, whether or not there is a reasonable basis for believing that evidence of such violations may be found on the premises searched.

Accordingly, the decision of the lower court is reversed and the case remanded to the district court for the purpose of entering an order denying the petition of Colonnade for the suppression and return of property.

APPENDIX II

Memorandum and Order of June 28, 1968 of District Judge Jack B. Weinstein

[Caption Omitted]

APPEARANCES:

JEROME M. STEMBER, Esq., 350 5th Avenue, New York, New York 10001, Attorney for Petitioner

JOSEPH P. HOEY, United States Attorney for the Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York 11201

DAVID P. STEINMANN, Assistant U. S. Attorney, Of Counsel

WEINSTEIN, D. J.

Petitioner instituted this proceeding pursuant to Rule 41 of the Federal Rules of Criminal Procedure seeking the return of certain property and suppressing its use as evidence in any subsequent trial, hearing or proceeding. Because "the property was illegally seized without a warrant" (Rule 41(e)(1)) the motion must be granted.

The facts are undisputed. The petitioner, Colonnade Catering Corp., conducts a catering business and has a New York State liquor license. While a party was in progress, three Internal Revenue Service special investigators accompanied by a Nassau County policeman arrived at petitioner's premises at approximately 4:00 P.M. on May 18, 1968. (One of the Internal Revenue investigators, while a guest at petitioner's premises the previous week, had noted possible violations of the excise tax law.) They had no search warrant.

After looking around the ballroom (a search which led to no seizures and the legality of which is not in issue here), the investigators demanded that the petitioner's locked liquor storeroom—located approximately seventy-five feet from the entrance to the ballroom—be opened for their inspection. Petitioner's president, the only person authorized to unlock the storeroom, refused. The investigators, who had been joined by the Internal Revenue Service area supervisor, forcibly broke into the storeroom and removed fifty-three bottles of liquor. No arrest was made then or since.

The government has thus conceded that there was no search warrant, no arrest and no consent to the search. Nevertheless, the government maintains that the search—and seizure incident thereto—were lawful because the premises were public and subject to inspection. We do not agree.

Except "in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." *Camara* v. *Municipal Court*, 387 U. S. 523, 528-29, 87 S. Ct. 1727, 1731 (1967). This case falls within none of these classes of exceptions.

The government argues that because the petitioner's premises were open to the public, the petitioner is not entitled to the protection afforded by the Fourth Amendment against a warrantless search. Objects not exposed for public view are fully protected against a warrantless search. In *Katz* v. *United States*, 389 U. S. 347 (1967), the Supreme Court rejected having the resolution of search

and seizure problems turn on "whether or not a given 'area,' viewed in the abstract, is 'constitutionally protected.'" "For," the Court declared, "the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. [Citations omitted.] But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." 389 U. S. at 351-52, 88 S. Ct. at 511 ("person in a telephone booth may rely upon the protection of the Fourth Amendment"). See also *Mancusi* v. *DeForte*, —— U. S. ——, ——, slip sheet p. 4 (1968) ("the Court's recent decision in *Katz* . . . makes it clear that capacity to claim the protection of the Amendment depends not upon a property right in the invaded place but upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion"). *United States* v. *Rabinowitz*, 389 U. S. 56 (1950), which approved a search of file cabinets, involved, unlike the case before us, a valid search warrant.

We need not decide whether a catering establishment which serves invited guests is properly characterized as "public." Under the *Katz* test, petitioner's locked storeroom, to which only the president had the key, must certainly be regarded as an area which petitioner sought "to preserve as private." It is entitled to constitutional protection. See also *United States* v. *Frisch*, 140 F. 2d 660 (5th Cir. 1944) (officers inspecting bar not entitled to break into upper floor where liquor stored); *cf. Wattenberg* v. *United States*, 389 F. 2d 853, 857-59 (9th Cir. 1968) (question of whether search of "open field" adjacent to defend-

ant's house protected by the Fourth Amendment; Court found that under *Katz* test, the search was illegal because it constituted "an intrusion upon what the resident seeks to preserve as private").

The government contends that its agents were engaged in a routine examination and inspection of the premises, and, consequently, were not required to obtain a search warrant before proceeding. There is no question but that numerous sections of the Internal Revenue Code authorize inspections. See, *e.g.*, 26 U.S.C. §§7606(a), 5146(b). These sections do not authorize warrantless inspections in the absence of consent. In *Camara* v. *Municipal Court*, 387 U. S. 530, 87 S. Ct. 1727 (1967), which arose from a warrantless search of a private resident by city housing investigators, the Supreme Court rejected the contention that the public interest requires that administrative searches be made without a warrant. While conceding that many desirable governmental policies require periodic inspection for their implementation, the Court nevertheless found that administrative searches "authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual." 387 U. S. at 534.

A companion case, *See* v. *City of Seattle*, 387 U. S. 541, 87 S. Ct. 1737 (1967), extended the reasoning of the *Camara* case to a warrantless inspection of a locked commercial warehouse. The Court saw "no justification for . . . relaxing Fourth Amendment safeguards" "merely because commercial rather than residential premises were the ob-

ject of the police instrusions." 387 U. S. at 543. As it noted,

> The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant. Ibid.

Any doubt that an individual is fully protected as to Fourth Amendment rights, even in a situation where the government has a right to inspect, was dispelled by the Supreme Court in its recent decision in *Mancusi* v. *DeForte*, —— U. S. ——, —— S. Ct. —— (1968). In a footnote, the Court pointed out (slip sheet p. 8, n. 11):

> The Court's opinion in Davis v. United States, 328 U. S. 582, does contain dicta to the effect that there is a lesser right to privacy when government officials have a "right" to inspect the seized items. See, e.g., id., at 593. However, the only holding in Davis was that there had been a valid consent to the search; the case "did not involve a search warrant issue." See v. City of Seattle, 387 U. S. 541, n. 7.

The government has not made any showing justifying its failure to obtain a search warrant. As the Supreme Court pointed out in the *Camara* case: "If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant" (387 U. S. at 539, 87 S. Ct. at 1736).

Memorandum and Order of Jack B. Weinstein, D.J.

The motion of the Colonnade Catering Corp. for the return of the property seized by the government is granted. Anything obtained as a result of the search is suppressed.

So ordered.

Dated: Brooklyn, New York, June 28, 1968.

_____

U.S.D.J.